Supreme Court, U.S.
FILED
MAR 4 1994
OFFICE OF THE CLERK

No. 93-1268

In The

Supreme Court of the United States

October Term, 1993

IN RE: L.F. JENNINGS OIL COMPANY,

Debtor,

NEW MEXICO ENVIRONMENT DEPARTMENT,

Petitioner,

v.

ORALIA FRANCO, Successor Trustee for the Estate of L.F. Jennings Oil Company,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Bankruptcy Court can approve abandonment of property of the estate that allegedly violates state environmental laws and regulations designed to protect the public health, where the evidence at trial failed to establish that there was imminent and identifiable harm to the public health and safety.

2. Whether the New Mexico Environment Department's ("NMED") appeal with respect to two (2) of the abandoned properties is moot because this Court cannot provide an effective remedy for NMED should it find in its favor on the merits.

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Respondent, Oralia Franco as the successor chapter 7 trustee for the bankruptcy estate of L.F. Jennings Oil Company, debtor ("Trustee"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's decision in this case. The Tenth Circuit's decision, as amended, is reported at 4 F.3d 887 (10th Cir. 1993).

STATEMENT OF THE CASE

In December 1990, the Trustee inherited a bankruptcy estate consisting in part of three (3) service stations known as Carrizozo, Capitan and Midtown (hereafter the "Properties"), all of which had been closed by the debtor prior to the petition date.[1] The Trustee never operated the debtor's businesses, and never caused or contributed to any contamination, at the Properties. Trustee's Appendix at A-3, A-4.

As required by 11 U.S.C. Section 704(1), the Trustee undertook to sell the Properties, which were subject to liens held by the Federal Deposit Insurance Corporation ("FDIC"). Before the Trustee could sell the Properties, prospective buyers required that he order tank and soil tests to determine whether the soil at the Properties was contaminated. *See* Petitioner's Appendix at 36. Although some fuel remained in the tanks, the tank and line tests showed that the underground storage tanks and lines were tight (i.e., not leaking). Trustee's Appendix at A-4;

[1] *See* Respondent Trustee's Appendix at A-2, which follows this brief ("Trustee's Appendix").

Petitioner's Appendix at 26. The Trustee spent approximately $10,000 of estate funds to test the soil and tanks at the Properties, and later to remove fuel from the tanks. Trustee's Appendix at A-2.

The soil tests showed that petroleum hydrocarbons were present in five (5) samples taken from the Properties in an amount equal to or greater than 100 ppm (parts per million). *See generally,* Petitioner's Appendix at 39. The New Mexico Underground Storage Tank Regulations require notice to petitioner, New Mexico Environment Department ("NMED"), if soil tests uncover hydrocarbons in the soil at amounts equal to or greater than 100 ppm.[2] The Trustee complied with the Regulations by providing telephonic and written notice to NMED of contamination at Midtown and Carrizozo on March 28, 1991, and at Capitan on April 19, 1991. Trustee's Appendix at A-4, A-5.[3] Even though informed by the Trustee of contamination at the Properties, and of the pending bankruptcy, NMED did not file an entry of appearance or request for notice in the bankruptcy case. Trustee's Appendix at A-3; Petitioner's Appendix at 7-8, 10.

Prior to receiving confirmation of the nature and extent of the FDIC's liens, the Trustee entered into a contract to sell Carrizozo. Petitioner's Appendix at 37-38. The FDIC objected to the sale, claiming that the estate did not have any equity in the Properties since the FDIC was

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[2] The Capitan and Carrizozo samples barely exceeded the minimum levels which required notice to NMED. *See generally,* Petitioner's Appendix at 39.

[3] See also NMED's Petition for Writ of Certiorari at 3 (February 1, 1994) ("Petition").

owed approximately $450,000 on promissory notes secured by the Properties. *Id.* at 38. Because of the FDIC's liens against the Properties and the current real estate appraisals, the Trustee concluded that the estate did not have equity in the Properties. *Id.* Thus, as required by 11 U.S.C. Section 554(a), the Trustee filed a motion to abandon the Properties, and on April 9, 1991, served notice of the motion on all creditors as required by the Bankruptcy Code. Trustee's Appendix at A-2, A-3. Objections to the Trustee's motion were due April 27, 1991. *See* Fed. R. Bankr. P. 6007(a), 9006(f).

NMED initially received notice from the Trustee of the potential soil contamination and of the pending bankruptcy in late March 1991, and had an opportunity to timely object to the motion to abandon the Properties. Trustee's Appendix at A-4, A-5, A-7; Petitioner's Appendix at 7-8, 10. NMED failed, however, to take any action in the bankruptcy case with respect to the Properties until August 16, 1991, when it filed its Motion to Reconsider and Quash Abandonment. Petition at 4.

In October 1991, the FDIC filed a motion for relief from the automatic stay pursuant to 11 U.S.C. Section 362(d). Petitioner's Appendix at 40-41. On October 3, 1991, the bankruptcy court entered a Stipulated Order granting the FDIC's motion which found that the estate had no equity in the Properties. Trustee's Appendix at A-3. NMED did not challenge the FDIC's motion, or appeal from the order.

In a letter dated May 21, 1992, NMED confirmed that underground storage tanks at Carrizozo had been removed and that NMED had determined that this site

did not pose an immediate public health or environmental threat. Petitioner's Appendix at 16. By letter dated June 15, 1992, NMED confirmed that all underground storage tanks had been removed from Midtown. *Id.* On May 19, 1992, Carrizozo and Midtown were deeded by the debtor, with NMED's concurrence, to third-party purchasers. Petition at 4.

ARGUMENT

This Court should deny the Petition for Writ of Certiorari for the following reasons: 1) The Petition does not meet the criteria upon which this Court grants certiorari; 2) The Tenth Circuit properly applied this Court's decision in *Midlantic* and found that the abandonment of Capitan was appropriate because it did not pose an imminent or identifiable harm to the public health or safety; 3) The Tenth Circuit properly found that NMED's appeal with respect to the abandonment of Carrizozo and Midtown was moot.

I. THE PETITION DOES NOT MEET THE CRITERIA UPON WHICH THIS COURT GRANTS CERTIORARI.

Rule 14.1 of the Rules of the Supreme Court of the United States, provides in part that a petition for writ of certiorari *shall* contain (emphasis added):

> (j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 10.

S. Ct. R. 10.1 contains a list of criteria which "while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered" by the Court in granting a petition. The petition filed by NMED is devoid of any of the criteria upon which this Court generally grants certiorari.

The decision of the Tenth Circuit in this case does not conflict with that of another court of appeals on the same matter. Nor does the Tenth Circuit's decision address a federal question in a way which conflicts with a decision of the New Mexico Supreme Court. Moreover, the Tenth Circuit's decision does not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's jurisdiction. S. Ct. R. 10.1(a). Finally, the decision below does not involve an important question of federal law which has not been, but should be, settled by this Court, or which conflicts with a decision of this Court. S. Ct. R. 10.1(c). To the contrary, the Tenth Circuit did nothing more than correctly apply the law as established in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986).

NMED makes no attempt to explain why its petition should be granted under the criteria established by this Court. Instead, NMED presents a one-sided and misleading argument of the evidence in the record below and then requests that this Court redraft 11 U.S.C. Section 554(a) by advisory opinion to compel chapter 7 bankruptcy trustees to remediate any environmental contamination found in estate property in every case. Such a request is contrary to *Midlantic*, and should be denied.

II. THE TENTH CIRCUIT PROPERLY APPLIED *MIDLANTIC* AND FOUND THAT THE ABANDONMENT OF CAPITAN WAS APPROPRIATE BECAUSE IT DID NOT POSE AN IMMINENT OR IDENTIFIABLE HARM TO THE PUBLIC HEALTH OR SAFETY.

NMED's petition should be denied because the Tenth Circuit's decision was based on undisputed evidence, and is consistent with this Court's ruling in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986). In *Midlantic*, the bankruptcy trustee sought to abandon property which contained 70,000 gallons of toxic, PCB-contaminated oil in deteriorating and leaking containers at a warehouse in Long Island City, New York. 474 U.S. at 497. This Court, faced with the prospect of a man-made health disaster in one of the most populated areas in the Country, concluded that "Congress did not intend for [Section] 554(a) to pre-empt all state and local laws." *Id.* at 506. This Court went on to explain:

> The Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety. Accordingly, without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, we hold that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.9

Id. at 506-507.

In footnote 9, this Court clarified and limited the impact of its ruling:

> This exception to the abandonment power vested in the trustee by [Section] 554 is a narrow one. It does not encompass a speculative or indeterminate future violatio.. of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from *imminent and identifiable harm.*

Id. at 507 (emphasis added).

The *Midlantic* decision does not prohibit a bankruptcy trustee from abandoning property of the estate which may be contaminated; it only restricts abandonment when it would result in an immediate threat to the public health from an identifiable harm. *Id.* The evidence presented to the bankruptcy court, which was reviewed by both of the appellate courts *de novo*, showed that the Properties did not pose an imminent and identifiable harm to the public health or safety. While the Tenth Circuit only applied *Midlantic* to the Trustee's abandonment of Capitan, both the bankruptcy and district courts found that neither Carrizozo nor Midtown posed an imminent or identifiable harm to the public when abandoned. Petitioner's Appendix at 11-12, 18, 26.

NMED's contention that "The state's expert witness in the bankruptcy court testified to the contrary . . . ," is inaccurate and was contradicted by that witness on cross-examination. Petition at 6. Mr. Bearzi testified that any claimed health threat by NMED was indeterminate and speculative: "The Capitan and Carrizozo sites simply

have not been investigated enough to determine what types of impacts they have. . . . " Trustee's Appendix at A-6. Mr. Bearzi also confirmed that NMED did not have enough data to conclude that there was any danger of explosion at any of the Properties, and also stated that only the "potential" exists at the Properties for any future harm to the public. Trustee's Appendix at A-7, A-8; *see Midlantic*, 474 U.S. at 507 n.9.

NMED's only other witness, Stephen Pullen, testified that NMED had not been able to confirm that the groundwater at Carrizozo or Capitan had been contaminated by fuel leaking from tanks at those sites. Trustee's Appendix at A-9. Mr. Pullen went on to testify that the tests NMED conducted were contradictory of one another, and that it is possible that the contamination found could have been paint thinner and not gasoline or diesel fuel. *Id.*

In light of the statements by NMED's witnesses on cross-examination, and the undisputed fact that NMED subsequently approved Carrizozo and Midtown as free from contamination so they could be sold,[4] NMED's contention that the Properties "constitute serious environmental health and safety threats" is not credible and was appropriately rejected by each of the lower courts. Petition at 7. There was no evidence presented by NMED to the bankruptcy court, and none exists, that the abandonment of the Properties posed any imminent or identifiable harm to the public.

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[4] See generally, Petitioner's Appendix at 16.

In its petition, NMED relies on *Alabama Surface Mining Commission v. N.P. Mining Company, Inc.*, 963 F.2d 1449 (11th Cir. 1992), in support of its argument for "broader environmental protection." Petition at 7. Neither *N.P. Mining Company, Inc.*, nor the cases cited therein, even mention a trustee's abandonment power under 11 U.S.C. Section 554(a). *N.P. Mining Company, Inc.* involved an administrative expense claim for fines assessed by the State of Alabama which related to the debtor's post-petition operation of its mining business. 963 F.2d at 1450. Unlike the instant case, the debtor and the chapter 11 trustee continued to operate the debtor's mining business in violation of state environmental laws after the bankruptcy was filed. *Id.* The only issue before the Eleventh Circuit was "Whether and when postpetition, punitive, non-tax penalties can be accorded administrative-expense status under [11 U.S.C.] Section 503(b)." *Id.* at 1451.

The Eleventh Circuit held that "penalties assessed for postpetition mining activities qualify as an administrative expense under Section 503(b)(1)(A)." *Id.* at 1453. The court based its decision on the federal policy embodied in 28 U.S.C. Section 959(b), which required that the *chapter 11* trustee operate the debtor's post-petition mining business in compliance with state law. *Id.* at 1453, 1458 (emphasis added). The instant case does not involve a Section 503(b) claim for an administrative expense, or a trustee, much less a chapter 11 trustee, who engaged in the post-petition operation of the debtor's business in violation of state law.

Pursuant to 28 U.S.C. Section 959(b), the Trustee was required to comply with New Mexico's Underground Storage Tank Regulations. The Trustee's duty under the

Regulations was to conduct soil and tank tests, and to report any soil contamination found at the Properties in excess of 100 ppm – which he did. Petition at 3; Petitioner's Appendix at 36-37. NMED is asking this Court to interpret Section 959(b) as compelling a chapter 7 bankruptcy trustee to "manage" contaminated estate property. Petition at 7. Section 959(b) does not mandate that a trustee manage and operate estate property in a chapter 7 liquidation bankruptcy case. In fact, such an interpretation is contrary to 11 U.S.C. Section 721, which expressly limits a trustee's ability to operate a debtor's business in a chapter 7 case. As importantly, NMED's argument is unrealistic since it ignores the impact of such a holding on the majority of chapter 7 bankruptcy filings in the United States, which are "no asset" cases.

It is undisputed that the Trustee never "managed or operated" the Properties during the bankruptcy case, and never caused or contributed to any contamination at the Properties. Trustee's Appendix at A-3, A-4. The Trustee, after inheriting closed service stations pursuant to 11 U.S.C. Section 541(a), complied with all State laws by using estate funds to test the Properties for contamination, by reporting the minimal contamination found to NMED as required by the Underground Storage Tank Regulations, and by filing all required reports until the motion to abandon was filed. Trustee's Appendix at A-4, A-5. The Trustee's compliance with New Mexico's Underground Storage Tank Regulations was duly noted by NMED's own expert witness. *Id.* at A-6.

Moreover, this Court in *Midlantic* specifically stated that Section 959(b) does not directly apply to an abandonment under [Section] 554(a) of the Bankruptcy Code –

and therefore does not delimit the precise conditions on an abandonment. 474 U.S. at 505. NMED's argument not only ignores this Court's footnote 9 in *Midlantic*, but also overlooks the fact that the bankruptcy court, in applying *Midlantic*, adopted an approach designed to protect the environment. In its Oral Ruling on NMED's Motion to Quash Abandonment, the bankruptcy court stated:

> I understand the State's position and I don't want you to think that we're going to ignore what I would consider even a reasonably likely environmental degradation, but I don't think that's what you have in this case. . . . The State's biggest complaint in this case seems to be that- . . . the Order of Abandonment was issued one day after the Trustee was supposed to file some other kind of report and I don't think that rises to the level of what the Supreme Court was talking about in the *Midlantic* case where they were talking about an imminent danger to the public.

Petitioner's Appendix at 26.

The bankruptcy court did not need to formulate conditions before approving the abandonment because the Trustee had taken adequate precautionary measures prior to seeking abandonment of the Properties. In addition to spending approximately $10,000 of estate funds to test the soil and tanks at the Properties, the Trustee took action to prevent possible future contamination by having the fuel removed from the tanks pursuant to a court-approved sale of the fuel inventory. Trustee's Appendix at A-2, A-4.

Further evidence that the Trustee had taken adequate precautionary measures, and that the Properties did not pose an imminent and identifiable harm to the public, is found in NMED's actions or inactions. NMED's witness, James Bearzi, testified that, pursuant to the Groundwater Protection Act, NMED prioritizes sites based on health and safety impact to humans, environmental impacts and potential problems. Trustee's Appendix at A-6. As was noted by the appellate courts below, NMED was so unconcerned with the health and safety impact at Capitan that it was not even listed for further investigation. Petitioner's Appendix at 11-12, 18.

III. THE TENTH CIRCUIT PROPERLY FOUND THAT NMED'S APPEAL WITH RESPECT TO THE TRUSTEE'S ABANDONMENT OF CARRIZOZO AND MIDTOWN WAS MOOT BECAUSE THAT COURT COULD NOT PROVIDE AN EFFECTIVE REMEDY FOR NMED IF IT HAD FOUND IN ITS FAVOR ON THE MERITS.

Since the initial appeal was taken, events have transpired which prevent an appellate court from granting effective relief to NMED with respect to Carrizozo and Midtown. In general, "[i]f events transpire during the pendency of the [bankruptcy] appeal which prevent the appellate court from granting effective relief, the appeal will be dismissed as moot." *Matter of T & H Diner, Inc.*, 108 B.R. 448, 452 (D.N.J. 1989). NMED itself has confirmed that the storage tanks have been removed from the ground at Carrizozo and Midtown. Petitioner's Appendix at 16. More importantly, based on NMED's findings that Carrizozo and Midtown did not pose a

serious threat to the public health, Carrizozo and Midtown have been sold with NMED's concurrence to third-party purchasers. Petition at 4; *see also* Petitioner's Appendix at 16.

It is well settled that the duty of an appellate court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895); *See also Matter of Sullivan Cent. Plaza, I, Ltd.*, 914 F.2d 731, 735 (5th Cir. 1990) (appeal properly dismissed as moot when appellate court lacks power to provide effective remedy for appellant should it find in its favor on the merits.)

As the Tenth Circuit noted, NMED is seeking an advisory opinion as to Carrizozo and Midtown. Petitioner's Appendix at 10. NMED confirms the point by arguing that "this Court's updated declaration is needed," apparently to resolve pending cases of "[b]ankruptcy courts and federal courts" which are "rife with irreconcilable digressions concerning a trustee's power to abandon. . . . " Petition at 8. Yet, no cases are cited by NMED in support of this broad and confusing statement. It is inappropriate for NMED to seek advisory opinions on other cases which may or may not be pending before lower courts – particularly when the facts of each case are likely to be very different.

NMED also argues that this matter is a dispute "capable of repetition, yet evading review." *Id.* The challenged conduct in this matter is whether a bankruptcy

trustee may abandon property of the estate under the limited exception to the abandonment power found in *Midlantic*. In an asset case where a chapter 7 trustee seeks to abandon property of the estate, he or she may only do so after "notice and a hearing." 11 U.S.C. Section 554(a); *see also* 11 U.S.C. Section 554(c). Before abandonment will be ordered, NMED will have an opportunity, along with other creditors, to object to the abandonment. *See* Fed. R. Bankr. P. 6007(a). Each matter must then be decided on a case by case basis depending on the relevant facts. If the property to be abandoned poses a threat to the public health as found by the bankruptcy court applying the *Midlantic* standard, abandonment will not be allowed. If it does not, abandonment will be permitted.

NMED's arguments that the appeal was not moot were properly rejected by the Tenth Circuit in its decision below. Petitioner's Appendix at 10. As that court noted, NMED will have ample opportunity to oppose abandonment in each case where the issue arises, should it properly enter an appearance and file a request for notice pursuant to the bankruptcy rules. *Id.; see* Fed. R. Bankr. P. 9010(b).

There is no relief that this Court can fashion for NMED at this time. All underground storage tanks at Carrizozo and Midtown have been removed, and those Properties were sold in 1992 with NMED's consent to third-party purchasers.

CONCLUSION

NMED's petition should be denied because under the undisputed evidence presented at trial each of the lower courts properly applied this Court's decision in *Midlantic*, and found that the abandonment of the Properties was proper. In its petition, NMED is trying to create an environmental issue which does not exist under the facts of this case for the purpose of obtaining an "updated policy declaration." *Midlantic*, when read in its entirety, provides a clear and appropriate direction to a bankruptcy court as to when a trustee should be allowed to abandon property of the estate which may be contaminated by petroleum hydrocarbons. These issues should be decided on the facts of each case, and 11 U.S.C. Section 554(a) should not be revised by advisory opinion to compel chapter 7 bankruptcy trustees to remediate any environmental contamination found in estate property in every case.

WHEREFORE, the Trustee respectfully asks that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE:

L. F. JENNINGS OIL COMPANY,
Employer ID# 85-0128945,

Case No. 7-90-04081 ML

Debtor,

MOTION TO RECONSIDER AND QUASH
ORDER OF ABANDONMENT

<TRANSCRIPT EXCERPTS>

BE IT REMEMBERED that the above entitled matter came on for hearing in the United States Bankruptcy Court before the Honorable Mark McFeeley, commencing at 9:00 a.m. on April 27, 1992, in Albuquerque, New Mexico, before Suzan E. Smith, a Notary Public and Court Reporter.

APPEARANCES

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* * *

THE COURT: L. F. Jennings Oil Company, case 7-90-04081 for final hearing on the New Mexico Environment Department's Motion to Reconsider and Quash the Order of Abandonment.

* * *

HARLEY SWINK

was called as a witness, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

* * *

BY MR. JURGENS:

Q. Were three of the debtor's assets the Carrizozo, Capitan and Midtown Mart One stores?

A. Yes, three of five filling stations that had operated.

* * *

Q. How much of the estate's money did you expend on these properties?

A. I can't tell what utilities payments were made but in the testing, the removal of product and its ultimate sale, the filling of the tanks with water for pressure testing, the removal of that, my memory would be that we spent about $10,000.

* * *

Q. Did the estate file a motion to abandon these three properties?

A. Yes, it did.

Q. Do you recall when that was done?

A. The first part of April would be my memory, 9th, 10th, something like that.

MR. JURGENS: Your Honor, may I ask the Court to take judicial notice that there is a court pleading in the court file dated April 10 of 1991, which reads Notice of the Trustee's Motion . . . to Abandon Property of the Estate.

THE COURT: Any problems, Mr. Sloan.

MR. SLOAN: None.

THE COURT: Okay.

Q. Mr. Swink, was it your understanding that . . . this Notice was served on all creditors [as] required by the bankruptcy [code]?

A. Yes, that's my understanding.

Q. To your knowledge was the New Mexico Environment Department a creditor at that time?

A. No, I don't believe they were.

Q. Had you received any sort of an Entry of Appearance or Request for Notice from anyone at the Environment Department?

A. No, I had not.

* * *

MR. JURGENS: Your Honor, I would ask again that you take judicial notice of an October 3, 1991, Stipulated Stay Order to the FDIC which covers these properties.

MR. SLOAN: No objection.

Q. Mr. Swink, since you took over as Trustee, have you operated either of these three properties at all?

A. No.

Q. Did the estate cause or contribute to any fuel or soil contamination of these properties to your knowledge?

A. No.

* * *

Q. Did the <es>tate have the tanks at Capitan and Carrizozo tested?

A. Yes.

Q. What were the results?

A. They were found to be tight and that includes the tanks and the piping and the lines.

Q. The lines also. Did the estate take any other action to remedy any other possible contamination of the sites?

A. Yes, remove the fuel.

* * *

JAMES BEARZI

was called as a witness, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SLOAN:

Q. Mr. Bearzi, . . . what does Exhibit 1 show?

A. Exhibit 1 is the form that is filled out when a release is first reported. This Exhibit 1 documents the

phone call between Mr. Jurgens and myself on March 28, 1991, reporting a release at the [Midtown] site.

Q. All right, what does Exhibit 2 show?

A. It's a similar document. This reports a release at the Carrizozo site, again a phone conversation between Mr. Jurgens and myself on March 28, 1991.

Q. What does Exhibit 3 show?

A. Similar memorandum of a phone conversation between Mr. Jurgens and myself on April 19, 1991, reporting a release at the Capitan site.

Q. What does Exhibit 4 show?

A. Exhibit 4 is a letter from Mr. Jurgens to myself confirming the telephone conversations that we had had in March on the Carrizozo site and the [Midtown] sites. And it reports the same information that we had talked about by phone as well as some additional information about some sampling results that ILFC had obtained<.>

* * *

Q. Can you say what Exhibit 11 shows?

A. Exhibit 11 is a letter from Mr. Jurgens to myself dated April 19, 1991, confirming the telephone conversation that Mr. Jurgens and myself had had previously regarding the Capitan site where Mr. Jurgens reported the release and gave us some of the minimum information required.

* * *

Q. Finally, what does Exhibit 14 show?

A. Exhibit 14 is a list of all the sites for which we have enough information to rank that are releases from underground storage tanks and have contaminated confirmation of soil and/or groundwater in the State. It's known as the Groundwater Protection Act, corrective action funds, prior<i>ty list and it ranks sites based on health and safety impact to humans as well as on environmental impacts as well as potential problems.

Q. Is the Capitan site listed on that ranking?

A. It is not.

* * *

Q. Mr. Bearzi, in connection with part 12 of the Underground Storage Tank Regulations, can you say whether Jennings Oil Company was in compliance with the requirements on April 10, 1991?

A. Our records indicate that these sites and Jennings Oil was in compliance on that date with part 12 of the Underground Storage Tank Regulations.

* * *

Q. Based on the documents you've testified to here and your educational, professional expertise in geohydrology, . . . do you have an opinion as to the seriousness of the si<t>es at Capitan, Carrizozo and Ruidoso?

A. I do.

Q. What is your opinion?

A. . . . The Capitan and Carrizozo sites simply have not been investigated enough to determine what types of impacts they have. . . .

CROSS-EXAMINATION OF JAMES BEARZI

BY MR. JURGENS:

* * *

Q. . . . <Y>our Exhibit 4 is the letter that I subsequently sent to you confirming the presence of some soil contamination?

A. That is correct.

Q. And when you received this . . . March 29, did you at that point contact Mr. Sloan or anyone else in the legal Department?

A. I did not.

Q. If you had wanted to, Mr. Bearzi, could you have contacted Mr. Sloan or anyone else in the legal Department?

A. I could have.

* * *

Q. Is it your testimony that the Capitan site, for instance, that there's a chance that there's going to be any explosions?

A. The Department does not have enough data because investigation has not been done to make that evaluation.

Q. So, if you don't have enough data, you can't say there's going to be any explosions on Capitan, can you?

A. That is correct.

Q. You can't say that's going to be any explosions or health threat on the Carrizozo site, can you?

A. At this time, correct.

Q. And you really are speculating when you tell us there's going to be an explosion at the [Midtown] property?

A. I guess I could not say with 100 percent certainty that there will be an explosion at the [Midtown] site.

Q. You have also testified that the potential exists for some sort of an explosion or some sort of serious health threat, isn't that true, sir?

A. At which site.

Q. At any of the sites?

A. That is correct. That potential exists.

Q. Again, when we're talking about "potential," you tell me, if I'm understanding you correctly, that means a possible future event that may occur or may not occur; is that correct?

A. That is correct.

* * *

STEVE PULLEN

* * *

was called as a witness and having been first duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. JURGENS:

* * *

Q. Is it safe to say that your report does not show that there's any groundwater contamination on the Capitan site?

A. Yes.

* * *

Q. Did you confirm, through either of your tests, sir, that there was any groundwater contamination at the Carrizozo property?

A. No, I did not confirm that.

* * *

Q. Is it possible that some of the contamination that you found could have been the result of paint thinner and not from gasoline and diesel fuel?

A. Yes, sir.